AIRCONDITIONING SYSTEMS DESIGN SDN BHD

v.

ATLAS ELECTRONICS (M) SDN BHD & ORS

HIGH COURT MALAYA, PENANG
T SELVENTHIRANATHAN J
[SUIT NO: 22-1643-1985]
11 APRIL 1998

CIVIL PROCEDURE: *Res judicata - Judgment - Final judgment obtained for price of goods - Whether subsequent action may be brought for return of goods - Whether right to claim for return of goods merged in earlier judgment - Whether plea of res judicata available*

CIVIL PROCEDURE: *Discovery - Discovery and inspection of documents - Whether must be before taking out summons for directions - Rules of the High Court 1980, O. 24 & O. 25*

CIVIL PROCEDURE: *Striking out - Want of prosecution - Witnesses for defendants include foreigners - Whether failure to prosecute action expeditiously results in prejudice to defendants - Whether action ought to be struck off*

The plaintiff had instituted two actions against different defendants on the ground that it had been prevented from removing certain goods ('the goods') from the first and second defendants' premises. In the related action, the third and fourth defendants in this action were cited as the only two defendants. Prior to instituting the said two actions, the plaintiff had obtained a final judgment against a particular company ('Avtech') for the price of the goods but the plaintiff did not claim for the possession or return of the goods then.

The defendants in this action applied to dismiss this action for want of prosecution pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980 ('the RHC') whilst the defendants in the related action applied to strike out that action pursuant to O. 34 r. 2 (2) of the RHC or the inherent jurisdiction of the court. The ground relied upon by the defendants in this action and the defendants in the related action was the same, that being, the excessive and inordinate delay on the part of the plaintiff in prosecuting the two actions had prejudicially affected the defendants in that witnesses who would be required for the trial could not be located or could not be located with great difficulty. Meanwhile, the plaintiff applied to strike out the defence in the related action on the ground that the defendants in the related action failed to comply with a court order directing the parties to serve on each other a list of documents

and an affidavit verifying the same within 14 days of the order and seeking to enter judgment for the plaintiff pursuant to O. 24 r. 16 of the RHC. It was in evidence, however, that the plaintiff itself had failed to file the affidavit and list in question within 14 days of the order. These three applications, at the request of the parties, were determined together.

Held:

[1] The plaintiff did not in any way condescend to explain how the plaintiff itself was not equally guilty of the same contumelious conduct it complained of when it failed to file the affidavit and list in question within the 14 day timeframe specified in the order of the court without first applying for and obtaining an order for enlargement of time. The plaintiff was equally as blameworthy as the defendants were in failing to comply with the order of the court and thus the plaintiff could not therefore lay any fault at the defendants' door without itself being hoisted with its own petard.

[2] Order 24 rule 16 of the RHC had no application in the circumstances of the related action as the breach of the rule complained of by the plaintiff was a failure by the defendants to comply with an order made on a summons for directions under O. 25 and not one made under O. 24 of the RHC. The provisions in O. 24 of the RHC are intended to come into play before the summons for directions is taken out under O. 25 of the RHC. The plaintiff had not taken any step under O. 24 of the RHC towards discovery and inspection of documents to trigger a consequential obligation on the defendants to respond thereto. If the defence in the related action is liable to be struck out pursuant to O. 24 r. 16 of the RHC as claimed by the plaintiff, then it could be argued with equal force that the plaintiff's suit in the related action should also be dismissed on the same basis.

[3] It was clear that the plaintiff had indeed not prosecuted both actions as expeditiously as it should have, having regard to the fact that among the defendants' witnesses were foreigners who had left the country after the defendant companies concerned had gone into receivership, or who otherwise were no longer available or were not to be found.

[4] At the time the plaintiff filed the claim against Avtech and obtained a final judgment for the price of the goods, it had elected not to seek the return of the goods, thereby conceding that the title in them had passed to Avtech. Having obtained judgment for the price of the goods, all the rights of the plaintiff would have merged in the judgment and it would in fact be too late to pursue a claim for the return of the goods from Avtech, let alone the defendants.

[5] Had Avtech not become insolvent and had the plaintiff sought to bring an action against Avtech for a declaration that the title in the goods had not passed to Avtech and consequently for their return to the plaintiff, this claim would have been met with a plea of *res judicata* as the matter had been determined with finality between the parties and the plaintiff could not relitigate the matter by raising a further cause of action which was available to it when it had first filed the claim against Avtech. It therefore follows that neither could the plaintiff raise that cause of action against the defendants in this action and the defendants in the related action as all the plaintiff's rights in respect of the goods would have merged in the judgment and the plea of *res judicata* would be available to the defendants.

[Order accordingly.]

Case(s) referred to:
Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 24 rr. 2(1), (7), (16), O. 25, O. 34 r. 2(2)

Other source(s) referred to:
Osborn's Concise Law Dictionary, 1996, 8th edn
Oxford Companion to Law, 1980 edn

For the plaintiff - Gan Teik Chee; M/s Gan Teik Chee Ho
For the defendants - Izabella de Silva; M/s Iza Ng Yeoh & Kit

Reported by Ling Hea Hoon & S Dharmendran

JUDGMENT

T Selventhiranathan J:

I would like to preface this judgment by stating that the grounds of judgment herein are in respect of decisions made on encl. (26) in this action and encls. (37) and (43) in suit 22-1618-1985 in the High Court in Malaya at Penang between:

Airconditioning Systems Design Sendirian Berhad ... plaintiff

and

1. Chuah Teong Hooi
2. Anthony Geoffrey
[as receivers and managers of the property of Atlas Intek (M) Sendirian Berhad] ... defendants

which suit shall hereinafter be referred to as "the related suit". Arguments on the said enclosures were, at the request of the parties, taken together, hence this single judgment involving all three enclosures together. Any reference in this judgment to any of these enclosures by itself shall be a reference to that enclosure as specified above.

Further, where any reference is made in this judgment to an order and/or rule by itself, that reference shall be to that specific order and/or rule of that order in the Rules of the High Court 1980.

On 5 September 1994 the defendants filed an application in encl. (26) to dismiss this action for want of prosecution pursuant to O. 25 r. 1(4) or the inherent jurisdiction of the court. The application was supported by an affidavit at encl. (25) affirmed on behalf of the defendants by one Hoh See Lee ("Hoh's affidavit") who was in the employ of the 3rd and 4th defendants, the receivers and managers of the 1st and 2nd defendants.

By Hoh's affidavit the defendants averred that the plaintiff had filed its claim against them on 27 December 1985 on the ground that they had failed to permit the plaintiff to remove an airconditioning system and other equipment ('the goods') it had delivered to and installed on the first and second defendant's premises pursuant to agreements which the plaintiff had entered into with a company called Avtech Construction Sendirian Berhad ('Avtech'). The defendant had filed their defence on 18 April 1986.

He further stated that on 18 September 1986, a judge, Mr Justice Edgar Joseph Jr (as his Lordship then was), made an order, *inter alia*, for priority to be given for the early trial of this action. On 2 April 1987, a notice of change of solicitors was filed on behalf of the plaintiff, followed by another change to the present solicitors on 12 June 1990. However, since 18 September 1986 until the affirming of his affidavit on 30 August 1994, Hoh stated that the plaintiff had ignored the order and failed to take out a summons for directions or any other proceeding in the matter.

He contended that the excessive and inordinate delay on the part of the plaintiff in prosecuting this action had prejudicially affected the defendants in that witnesses who would be required for the trial could not be located or could not be located without great difficulty, particularly the former directors or employees of the 1st and 2nd defendants (which companies had become insolvent), who had previously been involved in what took place and who were named in documents produced by the plaintiff in this action. On the other hand, the directors of the plaintiff were readily at hand to support the plaintiff's case at trial. By delaying the prosecution of this action, the plaintiff had given itself an unfair advantage over the defendants to the prejudice of the defendants. This was unjust as the defendants were not able to defend this action appropriately as a result thereof. The plaintiff did not have any good

reason for the delay or for ignoring the order of the court for the action to be given priority for early trial.

Hoh further averred that by another order of the court made on 29 September 1986 in the related suit, which had also been instituted by the plaintiff in this action, another judge, Mr Justice Mohamed Dzaiddin (as his Lordship then was), had directed that the related suit be tried at the same time as this action was tried. The plaintiff had similarly failed to prosecute that related suit and the defendants therein had also made an application to dismiss the same for want of prosecution.

That, essentially, was what was contained in Hoh's affidavit.

In the related suit, the 3rd and 4th defendants in this action were cited as the only two defendants there in their capacity as receivers and managers of a company called Atlas Intek (M) Sendirian Berhad. The claim against the defendants in the related suit was similar to that in this action.

The application by the defendants in encl. (37) in the related suit to strike it out for want of prosecution was made pursuant to O. 34 r. 2(2) or the inherent jurisdiction of the court.

The said Hoh again affirmed an affidavit, at encl. (36), in support of the application at encl. (37) in the related suit. The factual averments therein are similar to those in this action except that in the related suit the plaintiff had filed a summons for directions (encl. (26)) on 23 January 1987 but had failed to proceed with the hearing of the same or obtain any order thereon. However, on 18 May 1989, the plaintiff, after having changed its solicitors, had filed a further summons for directions (encl. (28)) and obtained an order on 27 September 1989 directing that the related suit be set down for trial within sixty days thereof. A sealed copy of this order had never been served upon the defendants. However, on 7 August 1992, the plaintiff had served on the defendants a list of documents and an affidavit verifying the list.

Hoh also stated in his affidavitat encl. (36) in the related suit that the plaintiff had ignored the two court orders therein and failed to take any steps in the matter since 27 September 1989 by setting down the related suit for trial or otherwise prosecuting it. The same reasons for prejudice to the defendants were advanced as earlier adverted to in relation to this action.

The plaintiff then filed an application at encl. (43) in the related suit to strike out the defence for failure to comply with the order of court of 27 September 1989 directing the parties to serve on each other a list of documents and an affidavit verifying the same within fourteen days of the order and seeking to enter judgment for the plaintiff pursuant to O. 24 r. 16.

A director of the plaintiff averred in the related suit that the plaintiff had on 3 August 1992 complied with this order of the court when its list of documents, and the affidavit verifying the list was affirmed, and both were filed. The plaintiff complained that the defendants were guilty of contumelious conduct by not complying with the order of the court dated 27 September 1989 with which it had complied. However, it is to be noted that the plaintiff did not in any way condescend to explain how the plaintiff itself was not equally guilty of the same contumelious conduct it complained of when it failed to file the affidavit and list in question within the fourteen-day timeframe specified in the order of the court without first applying for and obtaining an order for enlargement of time.

A number of affidavits were filed in both this action and the related suit, with accusations and counter-accusations being levelled by the parties at each other for the delay.

Written submissions were put in on behalf of the parties and elaborated upon orally at length, advancing and opposing each other's applications.

Having considered the submissions and the authorities cited, I was of the view that the defendants should succeed in their applications at encl. (26) in his action and encl. (37) in the related suit and that the plaintiff should fail in its application at encl. (43) in the related suit.

To deal with encl. (43) first, I agreed with the submissions of counsel for the defendants that O. 24 r. 16 had no application in the circumstances of the related suit as the breach of the rules complained of was a failure by the defendants to comply with an order made on a summons for directions under O. 25 and not one made under O. 24.

It is crystal clear from a careful reading of the whole of O. 24 that its provisions areintended to come into play **before** the summons for directions is taken out under O. 25: see O. 24 r. 2(1) and (7) (emphasis added). The plaintiff had not taken any step under O. 24 towards discovery and inspection of documents to trigger a consequential obligation on the defendants to respond thereto. If the defence were liable 16 as argued in the being against to be struck out pursuant to O. 24 r. 16 as claimed by the plaintiff, then it could be argued with equal force that the plaintiff's action in the related suit should also be dismissed, it begin subject to the same infirmity levelled against the defendants.

At any rate, as pointed out earlier in this judgment, the plaintiff was equally as blameworthy as the defendants were in failing to comply with the order of the court within the fourteen-day timeframe specified pursuant to the summons for directions, and the plaintiff could not therefore lay any fault at the

defendants' door without itself being hoisted with its own petard. In the circumstances, the application at encl. (43) was dismissed with costs.

Taking encl. (26) in this action and (37) in the related suit together, it was clear that the plaintiff had indeed not prosecuted both actions as expeditiously as it should have, having regard to the fact that among the defendants' witnesses were foreigners who had left the country after the defendant companies concerned had gone into receivership, or who otherwise were no longer available or were not to be found. Except for one Murugiah, s/o Marimuthu, other former foreign directors of the defendant companies had left Malaysia for their countries of origin and could not be located. As for Murugiah, he had been a director of only one of the defendant companies and the defendant receivers and managers had formed the view that his evidence would be hostile, having regard to developments.

But what was even more relevant to my mind was the fact that the plaintiff had obtained a final judgment against Avtech on 28 October 1985 (before instituting this action and the related suit) for the price of the same goods in question in suit 22-1282-1985 in the High Court in Malaya at Penang wherein the plaintiff had not claimed for the possession or return of the goods, which was an admission that the property in the goods had in fact passed to Avtech and consequently to the defendants.

In the circumstances, I found myself in agreement with counsel for the defendants who submitted that "the plaintiff would have been aware that having obtained judgment for the price of the goods all the rights of the plaintiff would have merged in the judgment and it would in fact be too late to pursue a claim for the return of the goods from Avtech, let alone the defendants".

My research showed that "merger" is defined, *inter alia,* in the eighth edn. (third impression, 1996) of *Osborn's Concise Law Dictionary* as follows:

> That operation of law which extinguishes a right by reason of its coinciding with another and greater right in the same person, eg, a life estate is merged in or swallowed by the reversion when the two interests come into the hands of the same person. A right of action on a simple contract debt is merged in the right of suing on a bond for the same debt, *and a right of action is merged in a judgment in the sense that no further action may be brought on the debt, but only on the judgment. A special characteristic of the debt, however, such as being a preferential claim in bankruptcy, is not lost merely because judgment is obtained in respect of the debt.* (emphasis added)

The *Oxford Companion to Law*, 1980 edn, defines "merger" as:

> **The incorporation of one right in another, a principle of wide application.** In real property, it arises where two estates in land become vested in the one person, so long as there is no contrary intention, express or implied, of the parties. In relation to charges on land, if a charge on land and the ownership of the land become united in the same person, merger results if that is the intention. Two or more charges also may be merged if that is the intention. Business mergers arise where two or more companies unite or one buys over another. This is now regulated by the Fair Trading Act 1973. (emphasis added)

At the time the plaintiff filed the claim against Avtech and obtained a final judgment for the price of the goods, which very goods are the subject-matter of this action and the related suit, it elected not to seek the return of the goods, thereby conceding that the title in them had passed to Avtech. Had Avtech not become insolvent and had the plaintiff sought subsequently to bring a further action against Avtech, this time for a declaration that the title in the goods had not passed to Avtech and consequently for their return to the plaintiff, as was being sought to be done in this action and the related suit, this claim would have been met with a plea of *res judicata* on the ground that the matter had been determined with finality between the parties and that the plaintiff could not relitigate the matter by raising a further cause of action which had been available to it at inception when it had first filed the claim against Avtech. It therefore follows that neither could the plaintiff raise that cause of action against the defendants in this action and the related suit as all the plaintiff's rights in respect of the goods would have merged in the judgment and the plea of *res judicata* would be available to the defendants.

The circumstances making available the pleas of *res judicata* and estoppel *per rem judicatum* were propounded succinctly by the late Mr Justice Abdoolcader SCJ in the case of *Superintendent of Pudu Prison and others v. Sim Kie Chon* [1986] 1 MLJ 494 where, speaking for the then Supreme Court, he stated as follows at pp. 498-499 of the report of that case:

> The earlier action instituted by the respondent on July 2, 1985 and which was struck out sought relief on the ground of discrimination in breach of article 8 of the Constitution **but in the present proceedings the grounds for relief have been augmented and declarations sought** to the effect we have indicated earlier. The appellants plead *res judicata* in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hovstead and others v. Commissioner of Taxation* [1926] AC 155 [at pp. 165-1661 and a catenation of cases to the like effect, namely, that the **plea of *res judicata* applies,** except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, *not only to points upon which the court was actually required by the Parties to form an opinion and pronounce a judgment, but to every Point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

(emphasis added)

There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v. Attorney-General for Queensland* [1979] AC 411 [at p. 425]:

> The second defence is one of *res judicata*. *There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings.* The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by the Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the board, there described in these words:
>
> > ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings" [page 590]. [Emphasis added]
>
> The attempt by way of the instant proceedings to relitigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police and others* [1982] AC 529 [at page 5421.

It was only after the plaintiff had already obtained final judgment against Avtech that it proceeded to seek declarations in this action and the related suit that the property in the goods had not passed to the defendants. No judgment for possession was made against Avtech and neither was it a party to this action and the related suit. All that the plaintiff had sought from Avtech and obtained judgment for was the payment for the balance sum of the goods.

For all the above reasons, the applications in encl. (26) and (37) were allowed with costs, and that in encl. (48) was dismissed with costs, resulting in this action and the related suit being dismissed for want of prosecution.